

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

OTIS THOMAS,

Plaintiff,

v.

M.S. EVANS, Warden,

Defendants.

No. C 06-3581 MMC (PR)

**ORDER OF SERVICE; DIRECTING
DEFENDANTS TO FILE
DISPOSITIVE MOTION OR NOTICE
REGARDING SUCH MOTION**

On June 5, 2006, plaintiff, a California prisoner currently incarcerated at Salinas Valley State Prison ("SVSP") and proceeding pro se, filed the above-titled civil rights action under 42 U.S.C. § 1983. On July 5, 2006, plaintiff filed an amended complaint against Warden M.S. Evans ("Evans"), Sergeant M. J. Kircher ("Kircher"), and Captain G. Ponder ("Ponder"), all SVSP officials. Plaintiff alleges defendants have deprived him of outdoor exercise for over 11 months, denied him privileges afforded other similarly situated inmates, and required him to sign documents in violation of his political beliefs. By separate order filed concurrently herewith, plaintiff has been granted leave to proceed in forma pauperis.

DISCUSSION

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. See id.

§ 1915A(b)(1),(2). Pro se pleadings must, however, be liberally construed. See Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. See West v. Atkins, 487 U.S. 42, 48 (1988).

After reviewing and liberally construing the amended complaint,¹ the Court finds cognizable the claims therein that defendants violated plaintiff's Eighth Amendment right to be free from cruel and unusual punishment, plaintiff's Fourteenth Amendment right to equal protection, and plaintiff's First Amendment rights.

CONCLUSION

For the reasons stated above, the Court orders as follows:

1. The Clerk of the Court shall issue summons and the United States Marshal shall serve, without prepayment of fees, a copy of the amended complaint in this matter, all attachments thereto, and a copy of this order upon **Warden M.S. Evans, Sergeant M. J. Kircher**, and **Captain G. Ponder** at **Salinas Valley State Prison**. The Clerk shall also mail courtesy copies of the amended complaint and this order to the California Attorney General's Office.

2. No later than **ninety (90) days** from the date of this order, defendants shall file a motion for summary judgment or other dispositive motion with respect to the claims in the complaint found to be cognizable above.

a. If defendants elect to file a motion to dismiss on the grounds plaintiff failed to exhaust his available administrative remedies as required by 42 U.S.C. § 1997e(a), defendants shall do so in an unenumerated Rule 12(b) motion pursuant to Wyatt v. Terhune, 315 F.3d 1108, 1119-20 (9th Cir. 2003).

b. Any motion for summary judgment shall be supported by adequate

¹The amended complaint supersedes the original complaint. See King v. Atiyeh, 814 F.2d 565, 567 (9th Cir. 1987).

1 factual documentation and shall conform in all respects to Rule 56 of the Federal Rules of
 2 Civil Procedure. Defendants are advised that summary judgment cannot be granted, nor
 3 qualified immunity found, if material facts are in dispute. If any defendant is of the opinion
 4 that this case cannot be resolved by summary judgment, he shall so inform the Court prior to
 5 the date the summary judgment motion is due.

6 3. Plaintiff's opposition to the dispositive motion shall be filed with the Court and
 7 served on defendants no later than **thirty (30) days** from the date defendants' motion is filed.

8 a. In the event the defendants file an unenumerated motion to dismiss
 9 under Rule 12(b), plaintiff is hereby cautioned as follows:²

10 The defendants have made a motion to dismiss pursuant to Rule 12(b) of the
 11 Federal Rules of Civil Procedure, on the ground you have not exhausted your
 12 administrative remedies. The motion will, if granted, result in the dismissal of
 13 your case. When a party you are suing makes a motion to dismiss for failure to
 14 exhaust, and that motion is properly supported by declarations (or other sworn
 15 testimony) and/or documents, you may not simply rely on what your complaint
 16 says. Instead, you must set out specific facts in declarations, depositions,
 17 answers to interrogatories, or documents, that contradict the facts shown in the
 18 defendant's declarations and documents and show that you have in fact
 19 exhausted your claims. If you do not submit your own evidence in opposition,
 20 the motion to dismiss, if appropriate, may be granted and the case dismissed.

21 b. In the event defendants file a motion for summary judgment, the Ninth Circuit
 22 has held that the following notice should be given to plaintiffs:

23 The defendants have made a motion for summary judgment by which
 24 they seek to have your case dismissed. A motion for summary judgment under
 25 Rule 56 of the Federal Rules of Civil Procedure will, if granted, end your case.

26 Rule 56 tells you what you must do in order to oppose a motion for
 27 summary judgment. Generally, summary judgment must be granted when there
 28 is no genuine issue of material fact--that is, if there is no real dispute about any
 fact that would affect the result of your case, the party who asked for summary
 judgment is entitled to judgment as a matter of law, which will end your case.
 When a party you are suing makes a motion for summary judgment that is
 properly supported by declarations (or other sworn testimony), you cannot
 simply rely on what your complaint says. Instead, you must set out specific
 facts in declarations, depositions, answers to interrogatories, or authenticated
 documents, as provided in Rule 56(e), that contradict the facts shown in the
 defendants' declarations and documents and show that there is a genuine issue
 of material fact for trial. If you do not submit your own evidence in opposition,
 summary judgment, if appropriate, may be entered against you. If summary

²The following notice is adapted from the summary judgment notice to be given to pro se prisoners as set forth in Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). See Wyatt v. Terhune, 315 F.3d at 1120 n.14.

1 judgment is granted in favor of defendants, your case will be dismissed and
2 there will be no trial.

3 See Rand v. Rowland, 154 F.3d 952, 963 (9th Cir. 1998) (en banc). Plaintiff is advised to
4 read Rule 56 of the Federal Rules of Civil Procedure and Celotex Corp. v. Catrett, 477 U.S.
5 317 (1986) (holding party opposing summary judgment must come forward with evidence
6 showing triable issues of material fact on every essential element of his claim). Plaintiff is
7 cautioned that failure to file an opposition to defendants' motion for summary judgment may
8 be deemed to be a consent by plaintiff to the granting of the motion, and granting of
9 judgment against plaintiff without a trial. See Ghazali v. Moran, 46 F.3d 52, 53-54 (9th Cir.
10 1995) (per curiam); Brydges v. Lewis, 18 F.3d 651, 653 (9th Cir. 1994).

11 4. Defendants shall file a reply brief no later than **fifteen (15) days** after
12 plaintiff's opposition is filed.

13 5. The motion shall be deemed submitted as of the date the reply brief is due. No
14 hearing will be held on the motion unless the Court so orders at a later date.

15 6. All communications by the plaintiff with the Court must be served on
16 defendants, or defendants' counsel once counsel has been designated, by mailing a true copy
17 of the document to defendants or defendants' counsel.

18 7. Discovery may be taken in accordance with the Federal Rules of Civil
19 Procedure. No further court order under Federal Rule of Civil Procedure 30(a)(2) or Local
20 Rule 16-1 is required before the parties may conduct discovery.


21 8. It is plaintiff's responsibility to prosecute this case. Plaintiff must keep the
22 Court informed of any change of address and must comply with the court's orders in a timely
23 fashion. Failure to do so may result in the dismissal of this action for failure to prosecute
24 pursuant to Federal Rule of Civil Procedure 41(b).

25 9. Extensions of time are not favored, though reasonable extensions will be
26 granted. However, the party making the motion for an extension of time is not relieved from
27 his or her duty to comply with the deadlines set by the Court merely by having made a
28 motion for an extension of time. The party making the motion must still meet the deadlines

1 set by the Court until an order addressing the motion for an extension of time is received.
2 Any motion for an extension of time must be filed no later than the deadline sought to be
3 extended.

4 IT IS SO ORDERED.

5 DATED: December 11, 2006

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7 MAXINE M. CHESNEY
8 United States District Judge
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